RECORD AND BRIEFS

(2)

Supreme Court, U.S.
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No. 10-1158

IN THE

Supreme Court of the United States

J.D. NETTLES, JR.,

Petitioner,

v.

CITY OF LEESBURG, FLORIDA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant the Petition, where the Eleventh Circuit's Opinion affirming the district court's dismissal of Petitioner's (Second) Amended Complaint with prejudice properly applied established law; where there is no conflict with a decision of this Court or a Court of Appeals; and where the Eleventh Circuit's ruling does not implicate any important federal question that has not yet been settled by this Court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iv
TABLE OF CITED AUTHORITIES	v
I. COUNTER-STATEMENT OF THE CASE	1
A. Course of Proceedings Below and Statement of Facts	1
B. Standard of Review Applied Below	7
II. REASONS THE PETITION SHOULD BE DENIED	7
A. NETTLES' FAILED TO MEET HIS BURDEN TO DEMONSTRATE THERE ARE "COMPELLING REASONS" FOR THIS COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI	7

Table of Contents

Page

B. THE DISTRICT COURT PROPERLY DISMISSED NETTLES' (SECOND) AMENDED COMPLAINT WITH PREJUDICE AND THE ELEVENTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL BECAUSE NETTLES CONTINUALLY FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED 11

III. CONCLUSION 24

TABLE OF APPENDICES

Page

APPENDIX A — (SECOND) AMENDED COMPLAINT FILED IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, OCALA DIVISION, ON JUNE 22, 2009 (STYLED AS "AMENDED COMPLAINT IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND FOR LAKE COUNTY, FLORIDA-CIVIL DIVISION)..... 1a

TABLE OF CITED AUTHORITIES

Page

CASES

Ashcroft v. Iqbal,
129 S. Ct. 1937 (2009) ..... *passim*

Barrett v. City of Margate,
743 So.2d 1160 (Fla.4th DCA1999) 20

Behm v. Campbell,
925 So. 2d 1070 (Fla.5th DCA 2006)..... 17

Bell Atl. Corp., v. Twombly, Inc.,
550 U.S. 544, 127 S.Ct. 1955 (2007) ..... *passim*

Blackmon Building Supply Co., Inc., v. Garesche,
383 So.2d 250 (Fla. 5th DCA 1980)..... 18

Busby v. City of Orlando,
931 F.2d 764 (11th Cir.1991) 15

Conley v. Gibson,
335 U.S. 41, 78 S. Ct. 99 (1957) 14

City of Hileah v. Rehm,
455 So.2d 458 (Fla. 4th DCA 1984)..... 17

Cuesta v. School Bd. Of Miami-Dade County,
285 F.3d 962 (11th Cir. 2002) 15

Cited Authorities

Page

Dismuke v. University of South Fla.,
2006 WL 166456 (M.D. Fla. 2006) 20

Dorsey v. Portfolio Equities, Inc.,
540 F.3d 333 (5th Cir. 2008)..... 12

Gladstone v. Smith,
729 So.2d 1002 (Fla. 4th DCA 1999)..... 20, 21

Glover v. Ligget Group, Inc.,
459 F.3d 1304 (11th Cir.2006)..... 7

Goldstein v. Sabella,
88 So.2d 910 (Fla.1956)..... 17

Horizons Rehabilitation Inc., v. Healthcare and Retirement Corp.,
810 So. 2d 958 (Fla. 5th DCA 2002) 18

Irwin v. Miami-Dade County Schools,
2009 WL 465066(S.D. Fla. 2009) 13

Mailly v. Jenne,
867 So. 2d 1250 (Fla. 4th DCA 2004) 17

Marsh v. Butler County, Ala.,
268 F. 3d 1037 (11th Cir. 2001)..... 13

Monell v. Dept. of Social Services of the City of New York,
436 U.S. 658 (1977) 14, 15

Page

Patterson v. Downtown Medical and Diagnostic Center, Inc., 866 F. Supp. 1379 (M.D. Fla. 1994) 18

Randall v. Scott, 610 F. 3d 701 (11th Cir. 2010) 15-16, 22

Roe v. Aware Woman Center for Choice, Inc., 255 F. 3d 678 (11th Cir. 2001) 14

Rush v. Macy's New York, Inc., 775 F. 2d 1554 (11th Cir. 1985) 20

SmileCare Dental Group v. Delta Dental Plan of California, Inc., 88 F. 3d 780 (9th Cir. 1996) 13

Wagner v. Daewoo, 314 F. 3d 541 (11th Cir. 1991), *rev'd enbanc vacated and remanded on other grounds*, 314 F. 3d 541 (11th Cir. 2002) 20, 23

STATUTES AND RULES

42 U.S.C. 1983 (West, WESTLAW, through P.L. 108-219, 2004) ..... *passim*

Sup. Ct. R. 10 ..... 7, 10

Fed. R. Civ. P. Rule 8, 28 U.S.C. (West,2008) ..... *passim*

Cited Authorities

Page

Fed. R. Civ. P. Rule 10, 28 U.S.C. (West, 2008) ..... *passim*

Fed. R. Civ. P. Rule 12, 28, U.S.C. (West, 2008) ..... *passim*

Florida Statutes § 768.28 (2008) 16, 17, 18

I. COUNTER-STATEMENT OF THE CASE

A. Course of Proceedings Below and Statement of Facts

Respondents object to the Statement of the Case submitted by Petitioner, as the purported statements are not "facts," nor were they alleged to be facts in any pleading in the Record below, and are otherwise irrelevant, inaccurate and improper. Petitioner, J.D. Nettles, Jr. (hereafter "Nettles"), who has at all times in this case been represented by counsel, filed a Petition for Writ of Certiorari (hereafter the "Petition") with this Court on or about March 21, 2011, seeking this Court's discretionary review of the Judgment entered by the Eleventh Circuit Court of Appeals (hereafter "Eleventh Circuit") on or about December 22, 2010, in favor of the Respondents, The City of Leesburg, Florida (hereafter "the City"), William Chrisman and Scott Mack (hereafter "the Officers")[1], and affirming the United States District Court, Middle District of Florida's (hereafter "district court") dismissal of Nettles' (Second) Amended Complaint with prejudice. The Record on appeal to the Eleventh Circuit consisted only of the filings in the district court. The City and the Officers will cite to the Record by identifying the document number on the district court

1. Nettles has included in the style of the case, two additional individually named Defendants who were not served with the Complaints or any of the Amended Complaints. Nettles has not even included their first names. The Respondents have not responded on their behalf, however, to the extent it could somehow be construed that the Court has jurisdiction over those individuals, then the Respondents hereby assert, on behalf of the other named Defendants, all arguments contained in this brief in opposition.

or Eleventh Circuit's dockets respectively, (i.e. "R-1" is document number "1" on the district court's docket; "RE-1" is entry number "1" on the Eleventh Circuit's docket). Nettles originally filed this action in State court, in the Fifth Judicial Circuit in and for Lake County, Florida on or about December 22, 2008. *(R-1, Composite Ex. "A" at 1-12).* The City and the Officers filed a Motion to Dismiss, which the State court granted, with leave to amend. *(R-1, Comp. Ex. "A" at 13-14; 17-18).* Plaintiff filed an Amended Complaint in State court, which was removed to the district court by the City and the Officers' Notice of Removal. *(R-1, Comp. Ex. "A" at 21-23).* At the time of removal, the City's Motion to Dismiss Nettles' Amended Complaint was pending, so the City supplemented the Motion with a Memorandum of Law in Support. *(R-3)(R-8).* The district court entered an Order Dismissing Nettle's Amended Complaint with leave to file a Second Amended Complaint within 20 days. *(R-14).*

Since the onset of the State court case, Nettles' has submitted multiple procedurally improper filings as acknowledged by both the State and district courts. Nettles filed a Motion for Default, prior to the time the Defendants' responsive pleading to the original Complaint was due, which was orally denied by the State court. *(R-1; R-7,* at 98-99).[2] Nettles filed a Motion for Summary Judgment, which he asserted was based upon the City and the Officers' alleged "failure to dispute any of the

---

2. Although at one point Nettles' attorney filed on Nettles' behalf, a "Pro Se" Motion to Proceed In Forma Pauperis, Nettles has in fact been represented by (the same) counsel throughout the proceedings in this case, and the Motion merely sought to proceed with the appeal without paying the Appellate filing fees. The district court denied the motion. (R-20-R21).

facts" in their Motions to Dismiss to Plaintiff's Complaint and Amended Complaint. *(R-12).* In the district court's Order dismissing Nettle's Amended Complaint, the court explicitly stated that Nettles' Amended Complaint failed to comply with Rules 8(a) and 10(b) of the Federal Rules of Civil Procedure. The district court, in the same Order, denied Nettles' Motion for Summary Judgment, reasoning that since neither the City nor the Officers had yet served an Answer, there was no way for the district court to determine what facts, if any, were in dispute. *(R-14 at 2).*

Nettles filed a (Second) Amended Complaint on June 22, 2009, with no exhibits or attachments. *(R-15)(Resp. Appdx.).* Although the specific nature of the claims Nettles has repeatedly attempted to plead are unclear, he appeared to base the action upon an alleged December 2, 2005 arrest. *(R-1, Ex. "A" at 3; R-2, at 1; R-15 at 2).* The (Second) Amended Complaint is an (unnumbered) three-page document containing six numbered paragraphs and no specific or separate counts. The (Second) Amended Complaint contains a one-paragraph purported "claim for relief" against all "defendants" generally which alleges only the following:

> "On December 2, 2005, Defendants violated the privacy and security of Plaintiff's protected property under color of law by searching the plaintiff illegally, which led to the illegal arrest, which led to the illegal detention and confinement of plaintiff. Plaintiff was incarcerated for 2 years as a result of the false arrest. Arrest was overturned on appeal, plaintiff has been subjected to systematic harassment. See attached complaint filed by

> Plaintiff [nothing was attached]. This is in accordance the policies or customs of Leesburg Police to search for violations of law." (R-15 at 2, Par. 5)(Resp. Appdx. at 2, Par. 5).

The City and the Officers filed a Motion to Dismiss the (Second) Amended Complaint with Memorandum of Law in Support on June 26, 2009, seeking dismissal with prejudice pursuant to Rule 12(b)(6), arguing that Nettles failed to state a claim upon which relief could be granted, and repeatedly failed to comply with the pleading requirements of Rules 8 and 10 of the Federal Rules of Civil Procedure and the district court's prior orders. *(R-16)*. A brief summary of the arguments contained in the Motion is set forth as follows:

> "The Second Amended Complaint is practically identical to the original complaint and amended complaints, and contains the same pleading deficiencies. The Second Amended Complaint as a whole is nothing more than a hodgepodge of purported statements of law and conclusory allegations. The Second Amended Complaint contains insufficient factual allegations to state a claim under any theory." (R-16 at 1).

Nettles did not file a response to the Motion to Dismiss the (Second) Amended Complaint. *(R-16-R-19)*. (Emphasis added). The district court entered an Order dismissing Nettles' Second Amended Complaint with prejudice on July 22, 2009, holding:

> "A review of the Second Amended Complaint demonstrates that it still falls short of the

> requirements of Rules 8(a) and 10(b). Other than removing several paragraphs, the Second Amended Complaint is a verbatim recitation of the prior amended Complaint, and (Nettles) does not provide any guidance as to the legal theories upon which relief is sought, or the factual basis for any of his requests for relief." *(R-17 at 2).*
>
> The district court also stated its reasons for dismissal with prejudice:
>
> "[Nettles] has now been given three opportunities to file a complaint which complies with the applicable pleading rules. In each instance, he submitted almost an identical document, with no attempt to correct any deficiencies. Providing any further chances to amend would therefore be futile and a waste of attorney and Court resources...Moreover, [Nettles] has failed to respond to the [City and the Officers'] latest motion to dismiss, which the Court interprets as acquiescence in the dismissal of this case. (R-17 at 2-3; Pet. Appdx. B at 2-3).

The district court entered judgment in favor of the City and the Officers on July 23, 2009. *(R-18).* Nettles did not file a motion for reconsideration of the order dismissing the (Second) Amended Complaint, request dismissal without prejudice, seek leave to amend, file a motion to amend or alter the judgment, or otherwise request an opportunity to amend or supplement the (Second) Amended Complaint, prior to filing the notice of appeal. *(R-18-19).*

The parties submitted their briefs, and the City and the Officers filed a Motion for Sanctions in the Eleventh Circuit, asserting Nettles' appeal, like the litigation before it, was frivolous. (RE-26). The Eleventh Circuit Court of Appeals (hereafter "Eleventh Circuit") originally set the case for oral argument on September 17, 2010. On July 30, 2010, the Eleventh Circuit sent a letter to the parties instructing them to be prepared to address the relevance, if any, of the Eleventh Circuit's June 30, 2010 decision in *Randall v. Scott*, 610 F.3d 701 (11th Cir. 2010) to the parties' previously filed briefs. On or about September 15, 2010, Nettles filed (but did not serve) an Emergency Motion for Continuance of oral argument. (RE-43). The Eleventh Circuit denied the Motion, but removed the case from the oral argument calendar and determined that the outcome of the appeal could be adequately decided on the parties' briefs alone. (RE-45;48). The Eleventh Circuit affirmed the district court's dismissal with prejudice, and entered its judgment on December 22, 2010 (issued as a mandate on January 21, 2011). (RE-50;52;55). A brief summary of the Eleventh Circuit's Order affirming dismissal with prejudice is set forth as follows:

> "Nettles' Second Amended Complaint does not allege sufficient "factual content that allows the court to draw the reasonable inference that the City of Leesburg Police Department is liable for any misconduct under § 1983....Nettles' legal conclusions of § 1983 liability by any of the Appellees [Respondents] are not supported by factual allegations....The state law claims alleged...contain solely legal conclusions. They do not comply with the pleading requirements set forth in *Iqbal*. The District Court did not

> err in concluding that Nettles failed to allege sufficient facts regarding his state law claims upon which relief could be granted." (RE-52 at 13-14; 17) (Pet. Appdx. C at 16-17; 21).

Nettles did not file a petition for rehearing with the Eleventh Circuit, and filed the instant Petition seeking certiorari review by this Court of the issue presented by Petitioner as "Is there a limit to the number of times a complaint may be amended?"

B. Standard of Review Applied Below

The district court's granting of the City and the Officers' Motion to Dismiss under Rule 12 (b)(6), Fed. R. Civ. P. was reviewed by the Eleventh Circuit Court of Appeals *de novo. Glover v. Ligget Group, Inc.*, 459 F.3d 1304 (11th Cir. 2006)(RE-52 at 8)(Pet. Appdx. C at 10).

II. REASONS THE PETITION SHOULD BE DENIED

A. NETTLES' FAILED TO MEET HIS BURDEN TO DEMONSTRATE THERE ARE "COMPELLING REASONS" FOR THIS COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI

At the onset, Nettles contends that this writ should be granted to decide whether there is "a limit to the number of times a complaint may be amended." (*Pet. at 18).* Nettles has not met his burden of demonstrating any "compelling reasons" for this Court to exercise discretionary review powers, pursuant to Supreme Court Rule 10. Nettles has not alleged, nor does this case present any important

federal question that is in conflict among the circuits, or with any of this Court's prior decisions. This case merely involves the application of the long-established, well-settled basic pleading rules of the Federal Rules of Civil Procedure, and Nettles' continued failure to comply with those rules. Nettles does not allege any viable legal basis for granting the Petition, and this case presents no compelling reasons for this Court to exercise its discretionary review power.

On appeal to the Eleventh Circuit, Nettles appeared to argue that he would not have been arrested if he was not a cocaine addict or if he "lived in the area (or era, as Nettles later argued) of the United States where cocaine is legal" (the City and the Officers are not aware of any such area), and further appeared to insult the intelligence of the district court because the district court dismissed Nettles' indecipherable complaints, citing primarily to general information websites as the authority for same, stating that an "average person of reasonable intelligence" could have understood what Nettles was trying to plead. *(RE-32-Applnts. Br. at 12-15).*

In this Petition, Nettles' misstates a number of "facts" and submits within the Petition a proposed (Fourth) Amended Complaint, neither of which were contained in the record below.[3] In the proposed (Fourth) Amended

3. Although the City and the Officers maintain that the purported (Fourth) Amended Complaint contained in the Petition should not be considered, they also contend that this (Fourth) Amended Complaint further demonstrates that dismissal with prejudice was proper and allowing further amendment would be futile, because the (Fourth) Amended Complaint also fails to state a claim.

Complaint, Nettles alleges (purportedly in support of a legal claim) that the City and the Officers "could have chosen not to arrest Nettles since it was clear he was only "possessing cocaine for recreational use and not distribution." (Pet. at 15). Nettles' counsel further alleges as grounds for the Petition that she made an off-the-record comment to the City's counsel (outside the presence of the court) that went unanswered after conclusion of a State court hearing, held on March 5, 2009, wherein the court dismissed Nettles' initial Complaint. Although the City's counsel vehemently denies the accuracy of this alleged exchange, even if it occurred as Nettles described, it would have no relevance whatsoever to the proceedings below or to the Petition. The hearing described was held over four months and two amended complaints prior to consideration of Nettles' (Second) Amended Complaint by the federal district court, and has no relevance to the propriety of the district court's dismissal of Nettles' Second Amended Complaint with prejudice. Nonetheless, in the State court, the City and the Officers clearly stated the legal basis for dismissal in its written Motion to Dismiss Nettles initial Complaint (R-1 at 13-14). The State court entered an Order granting the City and the Officers' Motion to Dismiss after a hearing attended by both parties' counsel. (R-1, Comp. Ex. "A" at 17-18). There was never any "misunderstanding" between counsel, and if there were any unilateral misunderstanding of Nettles or his counsel as to the requirements of State court's Order, Nettles' counsel could have remedied the alleged confusion by further inquiry or request for clarification to the court, or by conducting legal research to determine what allegations a complaint is minimally required to contain in order to state a legal claim for relief. Certainly, it was not the obligation of counsel for the City and the Officers

to advise Nettles' attorney how to properly research the elements of the claims she was purporting to allege, how to draft a complaint that would state a viable claim, comply with the State court's order, or otherwise advise Nettles' attorney on compliance with the State or Federal Rules of Civil Procedure. The City and the Officers' gave Nettles adequate notice of the grounds upon which their Motion to Dismiss was predicated as did the State court in granting the Motion.

Likewise, once this case was removed to the federal district court, the district court detailed, in written Orders, the specific reasoning and legal basis for dismissing Nettles' Amended and (Second) Amended Complaints---Nettles' repeated failure to comply with Rules 8(a) and 10(b) of the Federal Rules of Civil Procedure. Similarly, Nettles' attorney never filed a motion for clarification or otherwise requested clarification of any of the District Court's Orders. To the contrary, Nettles did not even bother to file a response to the City and the Officers' Motion to Dismiss the (Second)Amended Complaint, or request leave to amend the complaint again after the district court entered its Order of dismissal with prejudice. Nettles simply filed a notice of appeal and argued that an "average person of reasonable intelligence" could have deciphered what Nettles had unsuccessfully attempted to plead on multiple occasions before two different courts, despite multiple courts' warnings that Nettles' Complaints and amended Complaints failed to comply with basic pleading rules.

Supreme Court Rule 10 specifically provides that a petition for writ of certiorari is rarely granted when the "asserted error consists of factual findings" or the

alleged "misapplication of a properly stated rule of law." Nettles' Petition does not even assert or allege any error or appropriate grounds for this Court's review. This case presents no unusual situation or compelling reason for review. Rather, the case presents a situation where a plaintiff was given multiple opportunities to submit an amended complaint that could withstand a Motion to Dismiss under Rule 12 (b)(6), and despite multiple attempts, failed to comply with the long-established minimal pleading standards of Rules 8 (a) and 10 (b) of the Federal Rules of Civil Procedure. Nettles demonstrated no attempt to correct the pleading deficiencies raised in any of the allowed amendments, and acquiesced in dismissal with prejudice of the (Second) Amended Complaint by failing to respond to the Respondents' Motion to Dismiss it. Any further attempt to amend the complaint would have been futile, and would have been nothing more than a continued waste of judicial and attorney resources. Simply put, Nettles has completely failed to meet his burden to demonstrate there are any compelling reasons for this Court to exercise its discretionary review power. Therefore, the Petition should be denied.

B. THE DISTRICT COURT PROPERLY DISMISSED NETTLES' (SECOND) AMENDED COMPLAINT WITH PREJUDICE AND THE ELEVENTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL BECAUSE NETTLES CONTINUALLY FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED

The only "facts" considered by the district court relevant to the Petition were those that Nettles alleged

in the Second Amended Complaint, and the procedural history of this case. *(R-17) (Pet. Appdx. B at 1-3).* As previously stated, Nettles improperly attached to his brief and included in the Petition another purported (Fourth) Amended Complaint, which was never filed with either the State or district court prior to appeal, and was not properly served at any point during the proceedings below. *(Pet. at 15).* Therefore, it should not be considered, as it was not part of the record below, nor was it appropriately raised for the first time on appeal. *Dorsey v. Portfolio Equities, Inc.*, 440 F. 3d 333, 338 (5th Cir. 2008) (A court should refuse to accept as true the pleader's statements made for the first time in a brief that forms no part of the official pleadings).

There were multiple pleading deficiencies, both procedural and substantive, present in the (Second) Amended Complaint and its predecessors, and dismissal with prejudice was proper. The (Second) Amended Complaint as a whole is nothing more than a brief but vague and indecipherable hodgepodge of purported statements of law and conclusory allegations. In the first sentence of the (Second) Amended Complaint, Nettles vaguely refers to several titles of legal theories of relief, stating:

> "Plaintiff... files this complaint for Wrongful Arrest and Detention, Negligence, and Intentional Infliction of Emotional Distress against the ...defendants and alleges the following: . . ." (R-15 at 1-2). (Resp. Appdx. at 1-2).

However, the body of the (Second) Amended Complaint contains no further description of any legal claims alleged

and no factual allegations to support the elements of any claim for relief under any of the legal theories listed. *(R-15 at1-2); (R-16 at 3-4).* Further, the purported statement of jurisdiction did not allege facts demonstrating the district court had jurisdiction, particularly over any federal claims listed by Nettles. *(R-15 at 1-2)(Resp. Appdx. at 1-3).*

A motion to dismiss a complaint may be brought against a party for failure of that party "to state a claim upon which relief can be granted." *Rule 12 (b)(6), Fed. R. Civ. P., 28 U.S.C. (WEST, 2009).* When ruling on a Rule 12(b)(6) motion, the court may dismiss a claim either because it asserts a legal theory that is not cognizable as a matter of law or because it fails to allege sufficient facts to support an otherwise cognizable legal claim. *SmileCare Dental Group v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Circuit 1996), cert. denied, 519 U.S. 1028, 117 S. Ct. 583 (1996). A complaint is properly dismissed if the facts as pled do not state a claim for relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1968-69, 1974 (2007); *Irwin v. Miami-Dade Co. Schools*, 2009 WL465066(S.D. Fla. 2009). To avoid dismissal, pleaders must allege enough facts to raise their claims beyond speculation. *Twombly*, 550 U.S. at 556. The pleadings "must be something more than an ingenious academic exercise in the conceivable." *Marsh v. Butler County, Ala.*, 268 F. 3d at 1037 (11th Cir. 2001), quoting *United States v. Students Challenging Regulatory Ag. P.*, 412 U.S. 669, 688, 93 S.Ct. 2405 (1973). Dismissal is appropriate where the plaintiff has not "nudged claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 557-58; 570; *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). As this Court explained in *Twombly* and *Iqbal*, Rule 8 demands more than an unadorned, the defendant-unlawfully-harmed-me accusation. A pleading that offers

'labels and conclusions or formulaic recitation of the elements of a cause of action will not do. *Twombly*, 550 U.S. at 555; *Iqbal*, 129 S. Ct. at 1949-50. Nor does a complaint suffice if it tenders "naked assertions devoid of 'further factual enhancement'." *Id.*

Rule 8(a) requires a "short and plain statement of the claim" (commonly referred to as "notice pleading") showing entitlement to relief. Notice pleading may not require that the pleader allege a "specific fact" to cover each element of the claim, but it is still necessary that a complaint contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory. *Roe v. Aware Woman Center for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001)(quotations omitted). The (Second) Amended Complaint failed to comport with the basic pleading requirements of Rule 8(a) and this Court's ruling in *Twombly*, *Iqbal*, and even this Court's decisions prior to *Twombly*. See *Conley v. Gibson*, 335 U.S. 41, 47, 78. S. Ct. 99 (1957). The (Second) Amended Complaint is devoid of any factual allegations, and rendered it difficult, if not impossible to determine what claims Nettles is attempting to plead, not only against the City but particularly, what claims are alleged against the Officers. Nettles did not make any factual allegations whatsoever regarding any of the Officers other than that they "are citizens of the State of Florida" and "are or were employed by the Leesburg Police Department." (R-15 at 1, Par. 2) (Resp. Appdx. at 1-2, Par. 2).

Further, a local government (like the City) cannot be liable for § 1983 claims under a theory of *respondeat superior*. *Monell v. Department of Social Services of the*

City of New York, 436 U.S. 658, 694-95 (1977); *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991). Like the Plaintiff in *Iqbal*, Nettles was required to plead that "each officer, through his or her own actions, has violated the Constitution." *Iqbal*, 129 S.Ct. at 1948. A plaintiff must establish that an alleged constitutional violation was committed by a government official acting pursuant to a custom or policy of the local government. *Monell*, 436 U.S. at 694; *Busby*, 931 F. 2d at 776, citing *Monell*. It is not sufficient for the governmental body's policy to be tangentially related to a constitutional deprivation. *Cuesta v. School Bd. of Miami-Dade County*, 285 F.3d 962, 967 (11th Cir. 2002). Rather, an official policy or custom must be the moving force behind the constitutional violation in order to establish liability of a local government under 1983. *Id.*, citing *Gilmere v. City of Atlanta, Ga.*, 737 F.2d 894, 901 (11th Cir. 1984).

Since Nettles completely failed to allege any facts to support a viable claim against any of the Officers, any § 1983 claims against The City must also fail. Nettles has not alleged any facts sufficient to support any official policy of the City with a demonstrated causal relationship to any alleged Constitutional violations, nor any facts to even generally support any claims that Constitutional violations were committed by any defendant. At the time of the district court's dismissal of the (Second) Amended Complaint, the Eleventh Circuit followed a heightened pleading standard for claims under 42 U.S.C. § 1983. The Eleventh Circuit determined that a heightened pleading standard for 1983 cases involving qualified immunity was overruled by this Court in *Iqbal*. Subsequent to the filing of the appellate briefs by the parties in the Eleventh Circuit, the Eleventh Circuit decided *Randall v. Scott*, 610 F.3d 701

(11th Cir. 2010), holding that they would no longer apply a heightened pleading standard to complaints which raised issues of qualified immunity of government officials in § 1983 claims. However, as held by the Eleventh Circuit in the instant case, the (Second) Amended Complaint grossly failed to comply with the basic requirements of Rules 8 and 10 of the Federal Rules of Civil Procedure and the pleading standards set forth by this Court in *Twombly* and *Iqbal*. There were simply no factual allegations or logical basis set forth whatsoever to establish even the mere possibility of a viable claim for relief under § 1983, so the Eleventh's Circuit's cessation of application of a heightened pleading standard to complaints raising qualified immunity issues under § 1983 due to the decision in *Randall*, has no bearing or effect on the outcome of the instant case, which was properly dismissed with prejudice by the district court and affirmed by the Eleventh Circuit.

The complete lack of factual allegations to support any claim renders all of Nettles' purported federal and state law claims insufficient as a matter of law, under even the most liberal interpretation of the basic pleading standards of *Twombly*, *Iqbal*, this Court's pre-*Twombly* decisions, and *Rule 8*. The City and the Officers described in great detail in their Motion to Dismiss and Responsive Brief below, the elements for each cause of action Nettles' listed in the titled of his (Second) Amended Complaint. (R-16; RE-25;27). A more brief summary is set forth below, only to reiterate to this Court that allowing Nettles any further amendment would be futile. If Nettles was attempting to allege claims under Chapter 768, Florida Statutes (which governs Florida tort liability and sovereign immunity) against the City, then he improperly named the individual officers as defendants. Individual liability of government

employees is limited to specific circumstances, none of which were remotely alleged in Nettles' (Second) Amended Complaint. *Fla. Stat. § 768.28(9)*(Officers may not be named individually unless such officer acted "in bad faith, or with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.") Nettles' further failed to allege compliance with the conditions precedent to bringing an action in tort against a municipality as required by Fla. Stat. § 768.28(6). In addition, the nature of the relief requested by Nettles in the (Second) Amended Complaint is not available against a municipality or municipal officers. *(R-16); Fla. Stat. § 768.28(5)* (Providing that no judgment may be entered against a municipality in excess of $100,000, inclusive of attorney's fees; nor are punitive damages or prejudgment interest available).

To state a claim for false arrest or false imprisonment under Florida law, a plaintiff must show that the officers procuring his arrest exercised unlawful restraint and detained the plaintiff against his will. *City of Hialeah v. Rehm*, 455 So.2d 458, 461 (Fla. 4th DCA 1984). The existence of probable cause, regardless of whether a warrant was issued, is an absolute bar to a claim for false arrest. *Mailly v. Jenne*, 867 So.2d 1250 (Fla. 4th DCA 2004)(Emphasis added). The conviction of a criminal defendant (like Nettles), even if later overturned on appeal is an absolute bar to a civil false arrest claim, because it conclusively demonstrates probable cause. *Behm v. Campbell*, 925 So.2d 1070, 1072 (Fla. 5th DCA 2006); *Goldstein v. Sabella*, 88 So. 2d 910, 911-912 (Fla. 1956).

In order to properly plead a claim for negligence, a plaintiff must allege: (1) duty; (2) breach; (3) causation;

and (4) damages. *Blackmon Building Supply Co., Inc. v. Garesche*, 383 So.2d 250 (5th DCA 1980). Nettles has not alleged any facts regarding any acts or omissions he contends supports claims of negligence or by whom they were allegedly committed. To state a claim for relief for intentional infliction of emotional distress, a plaintiff must allege facts to demonstrate that the alleged wrongdoers conduct was intentional or reckless; the conduct was outrageous; the conduct caused emotional distress, and the emotional distress was severe. *Horizons Rehabilitation, Inc. v. Healthcare and Retirement Corp.*, 810 So. 2d 958, 964 (Fla. 5th DCA 2002). The standard for "outrageous conduct" is extremely high in Florida; the conduct must be so extreme in degree as to go beyond all possible bounds of decency, to be regarded as atrocious, and utterly intolerable in a civilized community. *Patterson v. Downtown Medical and Diagnostic Center, Inc.* 866 F. Supp. 1379, 1382-83 (M.D. Fla. 1994, citing *Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277, 278 (Fla. 1985). What constitutes "outrageous conduct" is a question for the trial court to determine as a matter of law. *Id.* Nettles has not only failed to plead what conduct, if any he alleges constituted this tort, but does not identify who allegedly committed it. The City as a political body certainly could not commit such an intentional tort, nor would the City be liable for any acts (even if properly alleged) of its officers. *Fla. Stat. § 768.28(a)(9).* Finally, the date Nettles appears to allege as the basis for his claims (an arrest on December 2, 2005) would render any alleged claim under the some or all of the legal theories listed futile, as not only is Nettles unable to state a claim upon which relief could be granted against the City or the Officers, but some claims would clearly fall outside the applicable statutes of limitations.

Nettles' (Second) Amended Complaint is also deficient because it was not separated into counts pursuant to Rule 10(b) of the Federal Rules of Civil Procedure. Rule 10(b), in relevant part provides that "each claim founded upon a separate transaction or occurrence... shall be stated in a separate count. . . whenever a separation facilitates the clear presentation of the matters set forth." *Fed. R. Civ. P. Rule 10(b).* The first sentence of the (Second) Amended Complaint indicates that Nettles is claiming Wrongful Arrest and Detention, Negligence, and Intentional Infliction of Emotional Distress. However, Paragraph 4 cites to titles of a number of different statutes and there are no factual allegations to support the elements of any distinct claims under these laws. The (Second) Amended Complaint contains six numbered paragraphs, and only one paragraph alleges a blanket "claim for relief" purportedly against "all defendants" under all cited legal titles contained in the first sentence, and there is no separation into counts.

It is not apparent when or what Nettles claims to have occurred that would provide a legal remedy, and if so, against whom. Nettles does not distinguish what relief he is seeking against either the City or the Officers, or provide any factual basis to support a claim against any of the named defendants.

As properly acknowledged by the district court, Nettles' Complaint, Amended Complaint, and (Second) Amended Complaint contained the same pleading deficiencies, and none of the Amended Complaints filed by Nettles in this action demonstrated even a minimal attempt by Nettles to correct the pleading deficiencies repeatedly noted by the City and the Officers, the State

court or the district court. Dismissal with prejudice is clearly proper where, as here, there was a complete failure to comply with Rules 8 and 10 of the Federal Rules of Civil Procedure. *Dismuke v. University of South Fla. Bd. Of Trustees,* 2006 WL 166456, *2-3 (M.D. Fla. 2006) (*Pro se* plaintiff filed multiple complaints which failed to comply with Rules 8 and 10, and failed to remedy the prior pleading deficiencies already noted by the defendant and the court, warranting dismissal with prejudice). A complaint must set some forth factual assertions that can be supported by evidence which gives rise to legal liability. *Id.* At all times in the instant case, Nettles was represented by counsel, who has an obligation to competently follow procedural rules, but failed to comply with even the most basic pleading rules.

A plaintiff need only be given one chance to amend the complaint before dismissal with prejudice is warranted. *Wagner v. Daewoo Heavy Indus. America Corp.*, 314 F.3d 541 (11th Cir. 1991), *rev'd en banc, vacated and remanded on other grounds*, 314 F. 3d. 541 (2002). This is especially true where, as here, the plaintiff did not request another amendment. *Id.* at 542-43. (Emphasis added). In fact, the Eleventh Circuit has found an appeal under these circumstances to be frivolous, warranting an award of sanctions against the appellant under Rule 38, F.R.A.P. *Rush v. Macy's New York, Inc.*, 775 F.2d 1554, 1557 (11th Cir. 1985). Although there is no magic number of dismissals without prejudice required before a complaint is dismissed with prejudice, Florida courts have held that dismissal of a complaint that is before the court for the third time is not an abuse of discretion. *Dismuke, 2006 WL 166547* at *3, citing *Barrett v. City of Margate*, 743 So. 2d 1160 (Fla. 4th DCA 1999) and *Gladstone v. Smith*, 729

So. 2d 1002 (Fla. 4th DCA 1999). Thus, the district court correctly held that Nettles' (Second) Amended Complaint:

> "still falls short of the requirements of Rules 8(a) and 10(b)," and that "other than removing several paragraphs, the Second Amended Complaint is a verbatim recitation of the prior Amended Complaint, and (Nettles) does not provide any guidance as to the legal theories upon which relief is sought, or the factual basis for any of his requests for relief." *(R-17 at 2) (Pet. Appdx. B at 2).*

The district court repeatedly referenced Nettles' complete failure to comply with the basic requirements of Rules 8 (a) and 10(b) of the Federal Rules of Civil Procedure. The district court noted that Nettles made no attempt to correct any deficiencies raised by the City and the Officers and reiterated by the court. The district court stated:

> "[Nettles] has now been given three opportunities to file a complaint which complies with the applicable pleading rules. In each instances, he submitted almost an identical document, with no attempt to correct any deficiencies. Providing any further chances to amend would therefore be futile and a waste of attorney and Court resources... Nettles failed to respond to the latest motion to dismiss, which the court interprets as his acquiescence in dismissal of this case." *(R-17 at 2).*

Moreover, as acknowledged by the Eleventh Circuit:

> "Nettles did not respond to the Appellees' last motion to dismiss, nor did he object to the District Court's dismissal. Nettles did not file a motion for reconsideration, nor did he request leave to amend his complaint." *(RE-52 at 17) (Pet. Appdx. At 21).*

The Eleventh Circuit, after a conducting a thorough *de novo* review of the record and the district court's dismissal of the (Second) Amended Complaint with prejudice, applied the proper pleading standards set forth in Rule 8, and by this Court in *Twombly* and *Iqbal*, and the Eleventh Circuit's own decision in *Randall*. The Eleventh Circuit specifically held that the district court's dismissal with prejudice of Nettles' (Second) Amended Complaint was proper, because measured by any pleading standard, Nettles failed to provide any guidance as to the legal theories upon which relief was sought nor the factual basis for any of his requests for relief. *(RE-52 at 12) (Pet. Appdx. at 15).*

The Eleventh Circuit correctly concluded that Nettles' (Second) Amended Complaint does nothing more that state legal conclusions that are unsupported by factual allegations, and do not comply with the pleading requirements set forth in *Twombly, Iqbal,* or Rules 8 and 10 of the Federal Rules of Civil Procedure. The Eleventh Circuit also emphasized that despite having three opportunities to file a complaint that complied with the basic applicable pleading requirements of Rule 8, Nettles failed to correct the deficiencies in his Complaint. Nettle's (Second) Amended Complaint does not contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal,* 129

S. Ct. at 1949. Further, Nettles did not even bother to respond to the City and the Officers' Motion to Dismiss the Second Amended Complaint, nor did he object to the district court's dismissal with prejudice, request dismissal be without prejudice, file a motion for reconsideration nor request leave to amend from the district court prior to the appeal. As reasoned by the Eleventh Circuit, "a district court is not required to grant a plaintiff leave to amend his complaint *sua sponte* when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." *Wagner*, 314 F. 3d at 542. Both courts correctly reasoned that "providing [Nettles]any further chances to amend would be futile, and a waste of attorney and court resources." *(R-17 at 2) (RE-52 at 7; 17) (Pet. Appdx. C at 9; 21).*

III. CONCLUSION

The instant Petition, like the multiple pleadings filed by Nettles before it, states no logical basis or compelling reasons to be considered by this Court. It is nothing more than a continuation of procedurally deficient litigation, and demonstrates a complete disregard for the Federal Rules of Civil Procedure and this Court's pleading standards. The district court properly dismissed Nettles' (Second) Amended Complaint with prejudice and correctly entered judgment in favor of the City and the Officers, and the Eleventh Circuit properly affirmed the judgment. Accordingly, the City and the Officers respectfully requests this Court to deny the Petition for Writ of Certiorari and bring finality and closure to the judgment entered in favor of the City of Leesburg and the individually named Officers.

Respectfully submitted this 23rd day of May, 2011.

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APPENDIX A — (SECOND) AMENDED COMPLAINT FILED IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, OCALA DIVISION, ON JUNE 22, 2009 (STYLED AS "AMENDED COMPLAINT IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND FOR LAKE COUNTY, FLORIDA-CIVIL DIVISION)

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND FOR LAKE COUNTY, FLORIDA- CIVIL DIVISION

Civil No. 2008CA6045

J. D. Nettles Jr.

V.

City of Leesburg - Police Department,
Chief of Police William Chrisman,
Officer Scott Mack, Officer A. Roman,
Officer Holtzclaw

AMENDED COMPLAINT FOR DAMAGES

Plaintiff, through the undersigned attorney being duly sworn, files this complaint for Wrongful Arrest and Detention, Negligence, and Intentional Infliction of emotional distress against the above named defendants and alleges the following:

1. The Plaintiff, J. D. Nettles is a citizen of the United States of America and the State of Florida, address 2350 Harlem Ave. Apt G Leesburg, FL 34748.

2. The Defendant, the City of Leesburg; is a municipality and a political subdivision of the State of Florida, organized under the laws of Florida. It is responsible for the policies, procedures, and practices implemented through its various agencies, agents, departments, and employees, and for injury occasioned thereby. The defendants Chief William Chrisman, Scott Mack, Officer A. Roman, and Officer Holtzclaw are citizens of the state of Florida and are or were employed by the Leesburg Police department located at 115 E. Magnolia Street, Leesburg, FL 54748.

3. The amount in controversy exceeds $15,000.00.

JURISDICTION STATEMENT

4. The court has jurisdiction based on the following federal codes.

US CODE TITLE 42 CHAPTER 21 SUBCHAPTER I § 1983 CIVIL ACTION FOR DEPRIVATION OF RIGHTS

US CODE TITLE 42 CHAPTER 21 SUBCHAPTER I § 1985 PARAGRAPH 3 (3) Depriving persons of rights or privileges

USC 42 CHAPTER 21 SUBCHAPTER I §1988 PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS

USC TITLE 42 CHAPTER 21 SUBCHAPTER I §1986 ACTION FOR NEGLECT TO PREVENT

Appendix A

Plaintiff seeks a declaratory judgment pursuant to the Federal Declaratory Judgments Act, 28 U.S.C. Sections 2201 and 2202 and 28 U.S.C. Sections 1331 and 1343.

STATEMENT OF CLAIM FOR RELIEF

5. On December 2, 2005 Defendants violated the privacy and security of the Plaintiffs protected property under color of law by searching the plaintiff illegally, which led to the illegal arrest, which led to the illegal detention and confinement of plaintiff. Plaintiff was incarcerated for 2 years as a result of the false arrest. Arrest was overturned on appeal, document attached. Since the arrest was overturned on appeal, plaintiff has been subjected to systematic harassment. See attached complaint filed by Plaintiff. This is in accordance the policies or customs of Leesburg Police to search for violations of law.

DEMAND FOR RELIEF SOUGHT

6. Plaintiff has suffered actual damages in excess of $13,200 as a result of losing his Social Security benefits as a direct result of the violation of his Constitutional rights under the Fourth and Fourteenth Amendments to be free from unlawful and unreasonable seizures of their private property Plaintiff has suffered emotional anguish and harm as a result of the violation of his Constitutional rights under the Fourth and Fourteenth Amendments to be free from unlawful and unreasonable seizures of their private property, plaintiff had a 1999 Blazer which was confiscated and never returned.

Appendix A

Plaintiff seeks punitive damages for the intentional violation of protected rights in the amount of $7,300,000., $100,000.00 for each day that plaintiff was confined unjustly from each Defendant plus reimbursement of social security benefits in the amount of $13,200.00. For a total of $36,500,000.00

WHEREFORE, plaintiff comes now with clean hands and pray the court grant him relief and prays for declaratory judgment and demands trial by jury, and demands payment of court costs attorney fee's and any all other relief that the court deems necessary and proper.

s/Marcia V. Forsett
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